Supreme Court, U.S.
FILED
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No. 92-1769

In the
Supreme Court of the United States
October Term, 1992

MICHAEL SALMINEN,

Petitioner,

v.

CONRAD M. FREDIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court should review constitutional claims which were never raised, preserved or decided in the state court.

2. Whether the trial court's issuance of summary judgment raises any federal question or constitutional issue where the basis for summary judgment was the Petitioner's failure to present a genuine issue of material fact.

3. Whether the Supreme Court should review a case which does not involve a conflict of decisions or unsettled federal law.

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STATUTES INVOLVED

1. Minn. R. Civ. P. 56.03 states:

> The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

2. Minn. R. Civ. P. 56.05 states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify on the matters stated therein. Sworn or certified copies of all papers or parts thereof referred

to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

3. Minn. R. Civ. App. P. 134.01 states:

Oral argument will be allowed unless:

(a) no request for oral argument has been made by either party in the statement of the case required by Rule 133.03; or

(b) a party has failed to file a timely brief as required by Rule 128.02; or

(c) the parties have agreed to waive oral argument pursuant to Rule 134.06; or

(d) The appellate court, in the exercise of its discretion, determines that oral argument is unnecessary because:

> (1) the dispositive issue or set of issues has been authoritatively settled; or
> (2) the facts and legal arguments could be adequately presented by the briefs and record and the decisional process would not be significantly aided by oral argument.
>
> The appellate court shall notify the parties when it has been determined that a request for oral argument has been denied. A party aggrieved by the decision may, within 5 days after the receipt of the notification and pursuant to Rule 127, request the court to reconsider its decision.

STATEMENT OF THE CASE

Respondent submits this Statement of the Case pursuant to Supreme Court Rule 15.1 to correct misstatements of fact contained in Petitioner's Statement.

None of the facts stated by Petitioner in his Statement are supported by the record. Indeed, Petitioner's counterclaim was dismissed because he

refused to support his allegations with any evidence whatsoever.

This case was commenced by Respondent to recover unpaid attorney's fees from Petitioner, Respondent's former client. Petitioner counterclaimed, alleging a wide variety of ethical violations and misconduct.

The trial court dismissed the bulk of Petitioner's claims upon motion for summary judgment, holding that an alleged violation of the Rules of Professional Conduct does not give rise to a civil cause of action against an attorney. (Order, dated 12/31/91, Respondent's Appendix at page A-1). Petitioner's allegations of fraud and malpractice survived the motion, although Petitioner did not submit any evidence to support the allegations.

Thereafter, Respondent conducted discovery on Petitioner's remaining claims. Petitioner refused to answer any question, in both written and deposition discovery, disclosing the factual basis for his allegations. On the day of trial, Petitioner refused to provide any evidence to support his claims. (Opinion of Court of Appeals, Petitioner's Appendix at page A-2).

The trial court heard testimony on Respondent's claim for unpaid attorney's fees and issued Findings of Fact, Conclusions of Law, and Order for Judgment in Respondent's favor. (Order dated 4/7/92, Respondent's Appendix at page A-7). The trial court dismissed Petitioner's counterclaim for failure to produce any factual support.

ARGUMENT

I. Petitioner's Constitutional Claims Were Never Raised, Preserved, Or Decided In The Lower Courts.

Petitioner raises his constitutional claims for the first time in his Petition for Writ of Certiorari. The Petition must, therefore, be denied.

A review by this Court on a writ of certiorari is discretionary. This Court long ago "established that the court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

Petitioner argues in his Petition that the Minnesota Court of Appeals denied oral argument on his appeal, depriving him of certain constitutional rights. Petitioner failed to raise this issue in

the state court. Moreover, Petitioner did not preserve the issue for appeal.

Minnesota Civil Appellate Procedure Rule 134.01 governs the allowance of oral argument. It provides, in relevant part:

> The appellate court shall notify the parties when it has been determined that a request for oral argument has been denied. A party aggrieved by the decision may, within 5 days after the receipt of the notification and pursuant to Rule 127, request the court to reconsider its decision.

Petitioner was provided notice of the denial of oral argument. (Notice of Non-oral Conference, Respondent's Appendix at page A-10). Petitioner did not object or request the court to reconsider. Thus, the issue of the constitutionality of the denial of oral argument was not preserved by Petitioner or decided by the lower courts. The Petition for Writ of Certiorari must, therefore, be denied.

II. The Lower Courts' Rulings Do Not Implicate Any Federal Questions Or Constitutional Issues.

The trial court granted summary judgment dismissing Petitioner's counterclaim. Minnesota's Rules of Civil Procedure regarding summary judgment provide, in relevant part:

> Judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.
>
> * * *
>
> . . . an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Minn. R. Civ. P. 56.03 and 56.05.

Petitioner's refusal to provide any facts in support of his legal malpractice

and fraud claims left the trial court with no alternative. Summary judgment was not just appropriate, it was mandated by Petitioner's refusal to present any facts to support his claims.

The basis of the lower courts' opinions was Petitioner's failure to present a genuine issue of material fact. (Petitioner's Appendix at page A-2). No federal questions or constitutional issues are implicated by the courts' rulings. The Petition for Writ of Certiorari must, therefore, be denied.

III. **The Lower Courts' Application Of Law Does Not Conflict With Discussions Of Other Courts, And Does Not Present An Important Question Of Unsettled Federal Law.**

The Minnesota state courts upheld summary judgment in favor of Respondent, dismissing Petitioner's counterclaim. The decision resulted from Petitioner's

refusal to present any factual basis for his claims.

Petitioner has cited no cases where any state of Federal court has issued a conflicting ruling or where a litigant's refusal to present evidence did not result in dismissal.

Moreover, the trial court applied the law of Minnesota only. No issue of Federal law was raised or decided by the Minnesota courts.

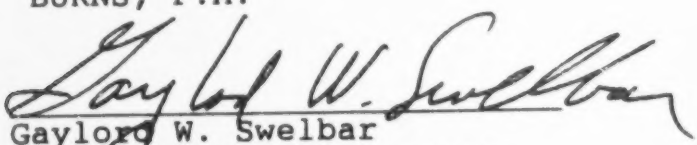
The Petition fails to present any grounds to justify the Court's issuance of a Writ of Certiorari. Supreme Court Rule 10.1. The Petition must be denied.

CONCLUSION

For the reasons expressed in this brief, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated this 20th day of May, 1993.

HANFT, FRIDE, O'BRIEN,
HARRIES, SWELBAR &
BURNS, P.A.

By 

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STATE OF MINNESOTA COUNTY OF ST. LOUIS

DISTRICT COURT CIVIL DIVISION

Conrad M. Fredin,

Plaintiff, ORDER

vs. File No. C91-30139

Michael Salminen,

Defendant.

The above-entitled matter came on for hearing before the Honorable Robert F. Berger, Judge of District Court, on the 31st day of December, 1991, at the St. Louis County Courthouse, Hibbing, Minnesota. The Plaintiff appeared through his attorney, Mr. Robin Merritt, Duluth, Minnesota and the Defendant appeared pro se on the following:

Plaintiff's alternative motions for summary judgment or a stay of placing the

case on the trial calendar and the Court having heard arguments of counsel makes the following:

ORDER

1. The Defendant shall be entitled to dispute the reasonableness of the Plaintiff's claimed attorney fees.

2. The Plaintiff's Motion for Summary Judgment on the purported cause of action raised by the Defendant that a violation of a rule of professional conduct is actionable is granted.

3. The parties by stipulation in open Court have agreed that the case will not go on for trial; the Court Administrator is ordered to place the case or for jury trial at the earliest possible date not sooner than 30 days from the date of this Order.

4. In all other respects the Motion for Summary Judgment is denied.

5. Let the attached Memorandum be made a part hereof.

Dated this 31st day of December at Virginia, Minnesota.

BY THE COURT:

/s/
Robert F. Berger
Judge of District Court

MEMORANDUM

A violation of rule of professional conduct should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulation of conduct through disciplinary agencies. They are not designed to be a basis for civil liability. L & H Airco, Inc. v. Rapistan Corp., 446 NW2d 372 (Minn. 1989).

A close reading of Defendant's counterclaim shows that a potential cause of action has been raised that may require jury determination. The Defendant complains of acts or omissions which may give rise to a legal malpractice claim. Depending on the type and quality of proof offered at trial the jury may be entitled

to hear those claims. Among the issues raised by defendant in his counterclaim are issues of failure to engage in discovery, wrongful withdrawal and fraud. The Court cannot rule on these issues at this time.

Although the Defendant has not artfully drafted his counterclaim, a broad reading of the counterclaim does put Plaintiff on notice of the potential for the claims being presented here and thus cannot be dismissed by the Court at this time. Defendant is cautioned, however, to understand that he will be held to the level of an attorney when appearing in Court and will be obligated to prove his counterclaim in accordance with the rules of evidence procedure and established laws.

The parties have agreed to withdraw this case from the calendar at this time and the Administrator is ordered to set it on for trial. The time limit set forth in the Order should be adequate for the discovery contemplated to be completed and this case then should be ready for trial in all respects.

R. F. B.

	Other Civil
STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF ST. LOUIS	SIXTH JUDICIAL DIST

Conrad M. Fredin, Court File C91-30139

Plaintiff,

vs. FINDINGS OF FACT CONCLUSIONS OF LAW, ORDER FOR JUDGMENT,

Michael A. Salminen,

Defendant.

The above-entitled matter came on for trial before the Court on March 23, 1992, at the St. Louis County Courthouse in Hibbing, Minnesota. Plaintiff appeared personally and through his counsel, Gaylord w. Swelbar of the law firm of Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A., 1000 First Bank Place, Duluth, Minnesota 55802. Defendant, appearing pro se, was present during the

proceedings but elected not to participate.

Based upon all of the evidence presented, the Court hereby makes the following:

FINDINGS OF FACT

1. On or about March 26, 1986, the defendant Michael A. Salminen retained the professional services of attorney Conrad M. Fredin.

2. That over the course of their attorney-client relationship, Mr. Fredin performed legal services for Mr. Salminen.

3. Despite being properly billed for said services, Mr. Salminen has failed or refused to pay Mr. Fredin, and is currently indebted to Mr. Fredin, in the amount of $6,869.53.

4. The Fee Agreement between Mr. Salminen and Mr. Fredin, and the charges

made for services rendered by Mr. Fredin, are reasonable and within the usual and customary range of fees for similar services within the area.

CONCLUSIONS OF LAW

1. Defendant Michael A. Salminen is indebted to Conrad M. Fredin in the amount of $6,869.53.

2. Mr. Fredin is entitled to judgment against Mr. Salminen in the amount of $6,869.53, plus his costs and disbursements, as allowed by statute, incurred herein.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated this 7th day of April, 1992.

BY THE COURT:

/s/
The Honorable Robert F. Berger
Judge of District Court

MINNESOTA COURT OF APPEALS
Minnesota Judicial Center
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130 WEST SUPERIOR STREET
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NOTICE OF NONORAL CONFERENCE

CASE NO.
C3-92-001164

IN RE: Conrad M. Fredin, Respondent, vs.
Michael A. Salminen, Appellant.

This matter has been set for nonoral conference on October 12, 1992 a the Minnesota Judicial Center. Counsel and parties are NOT allowed to make oral argument or attend the conference. A decision will be issued within 90 days after the date of the conference. See Minn. Stat. section 480A.08, subd. 3(a).

Subject to substitution, the judges assigned to hear the case are:

Gary L. Crippen
Roger M Klaphake
Harriet Lansing

ANY RECUSAL REQUEST MUST BE MADE IN ACCORDANCE WITH SPECIAL RULE OF PRACTICE 11.

Dated: September 02, 1992